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THOROUGHBRED HORSE RACING: WHY A UNIFORM APPROACH TO DRUG REGULATION IS NECESSARY

*Cody M. Conner**

INTRODUCTION

In May 2008, a crowd anxiously witnessed the aftermath of Eight Belle's narrow defeat in the Kentucky Derby.¹ Whereupon crossing the finish line, Eight Belles collapsed on two broken legs and was subsequently euthanized in front of a captivated audience—both present and at home.² As the world tried to understand this tragedy, the trainer of the Kentucky Derby winner, a horse named Big Brown, made a shocking admission: he had administered performance enhancing steroids to Big Brown prior to the race.³ After this startling admission, the horse racing community fell into a frenzy, stoking the debate around steroid regulation for horse racing commissions across the United States.⁴ This debate has driven the commissions to request Congress to adopt uniform rules regulating drug usage in thoroughbred race horses. This request, however, has largely proven ineffective.

Legislative oversight of horse racing can be traced back to the 1978 Horse Racing Act—a law providing the Federal Trade Commission with oversight and enforcement powers to implement rules and practices for the sport.⁵ Specifically, this Act regulates “interstate commerce with respect to parimutuel wagering on Thoroughbred horseracing in order to protect and further the Thoroughbred horseracing industry of the United States.”⁶

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¹ Bradley S. Friedman, *Oats, Water, Hay, and Everything Else: The Regulation of Anabolic Steroids in Thoroughbred Horse Racing*, 16 ANIMAL L. 123, 125 (2009).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ John T. Wendt, *Horse Racing in the United States: A Call for a Harmonized Approach to Anti-Doping Regulation*, 25 J. LEGAL ASPECTS OF SPORT 176, 177 (2015).

⁶ Horse Racing Act of 1978, 15 U.S.C.S. § 3001 (LexisNexis, Lexis Advance through PL 115-51, approved 8/18/17)

Notably lacking from this legislation, however, is any rule that regulates drug use in thoroughbred horse racing. Consequently, there remain thirty-eight separate state racing commissions with thirty-eight different sets of regulations.⁷ Although no uniform approach has been adopted to resolve this issue, numerous attempts have been made.⁸

Most recently, Representatives Andy Barr of Kentucky and Paul Tonko of New York proposed the Thoroughbred Horseracing Act of 2015 (THA).⁹ This legislation aimed to task the United States Anti-Doping Agency (USADA) with standardizing medication regulations across the states.¹⁰ There has also been other similar proposed legislation seeking uniformity. In fact, while the THA was put before the House Subcommittee on Commerce, Manufacturing, and Trade, similar legislation was simultaneously pending before the House;¹¹ neither of the proposed bills, however, made it out of committee.¹²

Proponents of uniform drug policies are concerned with more than just the general welfare of horses. Joseph De Francis, a former Maryland Jockey Club CEO and thirty-five-year industry veteran, believes that such policies are needed to replace the fragmented, state-by-state patchwork of regulations to provide clarity within the sport.¹³ Additionally, other advocates argue that the decrease in followers of horse racing has reduced the sport to an item of nostalgia.¹⁴ Because of this decline in followers, the amount of gambling on horse races has also decreased, leading to lower industry revenues.¹⁵

Opponents of uniform drug policies, or at least those similar to the THA, point to the broad powers such policies attempt to vest in organizations—particularly private organizations like the USADA.¹⁶ Specifically, these opponents argue that such federal

⁷ Wendt, *supra* note 6, at 177.

⁸ *Id.*

⁹ Jeff Zalesin, *House Bill Calls for National Thoroughbred Doping Rules*, LAW360 (July 16, 2015), <http://www.law360.com/articles/680227/house-bill-calls-for-national-thoroughbred-doping-rules>.

¹⁰ *Id.*

¹¹ H.R. 3084; *see also* H.R. 2641, 114th Cong. (referred to H. Subcomm. on Commerce, Mfg., and Trade, June 5, 2015) (LEXIS).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Zalesin, *supra* note 10.

action would usurp states' rights and create an unneeded layer of bureaucracy.¹⁷ Ed Martin, President of the Association of Racing Commissioners International (ARCI), said, "The ARCI is unanimous in its opposition to the accountability by putting it in the hands of a private organization."¹⁸ Martin further argued that equine welfare and medication policy should not be put in the hands of an entity with no experience in the industry and no veterinarian involvement.¹⁹

Though Mr. Martin speaks for many in the industry, not all opponents outright reject horse racing being regulated by private authorities; rather, they only believe that the USADA, an organization responsible for monitoring drug abuse in human athletes, is not the best-equipped to do so.²⁰

Then there are those who argue that any form of federal regulation providing uniform drug policies is wholly unnecessary. Phil Hanrahan, CEO of the National Horsemen's Benevolent and Protective Association, is one such individual. He insists that horse racing is a clean sport, independent of any further federal legislation. As evidence, he references the low amount of positive drug test results relative to the total amount of those conducted in the United States. Accordingly, Mr. Hanrahan rejected a bill proposing uniform drug regulation, similar to the THA, in 2013.²¹

Despite these disagreements, one area of industry consensus is that the welfare of horses must be the primary concern of any effort to combat doping. While most agree that doping horses is not good for the sport, there are disagreements regarding the most suitable approach to establishing and enforcing drug regulations. There are two approaches: (1) state-by-state patchwork regulations (currently applied); and (2) the federal approach.²² Prior to adopting either approach, it is essential to consider the industry's recent economic history.

¹⁷ Barker, *supra* note 14.

¹⁸ ARCI, *NHBPA Express Opposition to Proposed Horseracing Integrity Act*, PAULICK REPORT (July 16, 2015, 3:53 PM), <http://www.paulickreport.com/news/the-biz/arci-expresses-concern-over-proposed-horseracing-integrity-act/>.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Ray Paulick, *HBPA: Feds Addressing Problem that Does Not Exist*, PAULICK REPORT (Nov. 21, 2013, 12:57 AM), <http://www.paulickreport.com/news/ray-s-paddock-horse-racing-comes-to-washington-written-testimony-for-todays-hearing/>.

²² *Id.*

In drafting the THA of 2015, Congress made findings that the horse racing industry accounts for approximately \$25,000,000,000 and 38,000 jobs in the United States economy annually. The findings further provided that “[fifty] percent of the 317,000 starts by Thoroughbred horses in 2014 were made by horses that competed in more than one State.”²³ The aforementioned 1978 Horse Racing Act enables the federal government to regulate the horse racing industry due to its effects on interstate commerce.²⁴ Thoroughbred horse racing’s impact on the nation’s economy underscores the need for uniform drug regulation. Uniform drug regulation would help stabilize the industry and permit it to regain the critical following that was lost due to disillusionment by rampant doping practices.

Accordingly, this Note argues that congressional action must be taken to achieve a uniform approach to drug regulation in thoroughbred racing. Part I provides further background information regarding the current, state-by-state approach to drug regulation; an approach that permits rule exploitation by states. The regulations currently in place in Kentucky and New York illustrates how this approach permits exploitation. Moving to the alternative approach, Part II briefly provides more background information regarding the benefits of a national approach to drug regulation and focuses upon prior efforts to do so. Next, Part III further describes the THA of 2015, distinguishes this legislation from past efforts, and offers an explanation as to why it, like previous efforts, will likely fail. Part IV analyzes the arguments against the congressional implementation of a national approach. Last, Part V offers a simpler approach to instituting a uniform drug policy via an amendment to the 1978 Horse Racing Act. Specifically, the focus and conclusion will be that this approach would not constitute an unconstitutional usurpation of states’ rights.

I. STATE-BY-STATE APPROACHES

A. Background

²³ H.R. 3084, 114th Cong. (1st Sess. 2015).

²⁴ Wendt, *supra* note 8, at 177.

For general purposes, the horse racing industry as a whole is represented by the National Thoroughbred Racing Association (NTRA).²⁵ The NTRA is a coalition that includes “the leading racetrack owners, trainers, affiliated racing associations, [and] horse owners and breeders.”²⁶ The purpose of this organization is “to serve the industry as a consensus builder around solutions to problems of national importance to the horseracing industry.”²⁷ The ability of this organization, however, to recommend reform is limited and does not extend to drug regulation. Thus, drug regulation is still left to the thirty-eight separate state racing commissions; an arrangement that has led to the development of thirty-eight different sets of regulations.²⁸

Each state commission regulates the horse racing industry, within its state, as a member of the Association of Racing Commissioners International (ARCI).²⁹ While the ARCI offers guidance with respect to national standards for the industry, the states themselves regulate their individual activities.³⁰ Therefore, the current fragmented system allows each state to regulate drug usage in horse racing how they see fit.

This fragmented system is inherently problematic. Each of the thirty-eight state racing commissions operate in exclusion while they actively compete against one another for a limited number of horses to start at their tracks.³¹ This is because the greater the number of horses started at a given track, the greater the “handle,” that is the amount of money wagered in the parimutuels, will be at that track.³² Increases in handles then lead to increases in the tax revenues generated by each individual state. This in turn incentivizes state racing commissions to implement lenient regulations to attract more owners, trainers, and ultimately horses.³³

²⁵ Anthony Russolello, *Avoiding a Triple Crown: The Need for a National Horse Racing Commission*, MICHIGAN STATE UNIVERSITY COLLEGE OF LAW: ANIMAL LEGAL & HISTORICAL CENTER (2009).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Kyle Cassidy, *Reining in the Use of Performance Enhancing Drugs in Horseracing: Why a Federal Regulation is Needed*, 24 SETON HALL J. SPORTS & ENT. L. 121, 128 (2014).

³² *Id.*

³³ *Id.* at 128-29.

Put more simply, Barry Irwin, a prominent racehorse owner and CEO of Team Valor International, testified to Congress that states are in a constant competition with each other for top horses with trainers lobbying for laxer drug rules. States that appease these trainers get the horses.³⁴ These lobbying efforts, and subsequent state appeasement, undermine any attempt at uniform drug regulation; rather, they perpetuate a disjointed system and expose state racing commissions to exploitation.

B. State-by-State Analysis

Currently, states are perpetually competing to acquire more horses for their races.³⁵ Some states have relaxed drug regulations to do so;³⁶ others have not. This disjointed system has led to trainers dosing horses differently in different states.³⁷ Two states in particular illustrate this problem: Kentucky and New York.

Kentucky has long been recognized as a leader in many aspects of the thoroughbred horse racing industry, including drug regulation. Kentucky has approved a ban that outlaws anabolic steroids for horses in competition, but allows veterinarians to administer three naturally occurring steroids for therapeutic purposes.³⁸ Regarding the former, Kentucky has completely banned the use of stanozolol.³⁹ Stanozolol, also marketed under the trade name Winstrol is an anabolic steroid that is not naturally occurring in horses and can be detected months after its administration.⁴⁰ Stanozolol, while used as a short-term stimulus for a horse's appetite, can have powerful muscle-building effects if used regularly.⁴¹ According to Jerry Yon, the Chairman of Kentucky's Equine Council, the state's ban of stanozolol is an example of how Kentucky's rules are stricter than other states—many of whom permit the use of the steroid.⁴²

³⁴ *Id.* at 129.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Russolello, *supra* note 28.

³⁹ Russolello, *supra* note 28.

⁴⁰ Matt Hegarty, *New York bans use of anabolic steroid stanozolol*, DAILY RACING FORUM (Feb. 29, 2016), <http://www.drj.com/news/new-york-bans-use-anabolic-steroid-stanozolol>.

⁴¹ *Id.*

⁴² *Id.*

Until recently, New York was one of the states allowing restricted use of stanozolol.⁴³ Under New York's previous regulation, stanozolol could appear in post-race samples at trace levels, thus allowing for administration of the drug as long as it was administered several months before the race.⁴⁴ Following this recent ban, the New York State Gaming Commission stated, "There is no valid reason to administer [stanozolol] to a healthy racehorse, and there are better alternatives that are permitted for horses that are sick and injured."⁴⁵

The differences in drug regulation between these states are critical in the sport of thoroughbred horse racing. Both New York and Kentucky host a leg of the Triple Crown.⁴⁶ With both states implementing different drug regulations, horses eligible to compete in New York can still be in violation of Kentucky's steroid policy.⁴⁷ That is, horses permitted to race in one jurisdiction, while using a particular steroid, could fail to clear a drug test in another jurisdiction while using that same steroid.⁴⁸ Though this is only one example, it clearly shows why congressional action to formulate a uniform approach to drug regulation is necessary.

Despite the differences between Kentucky and New York, two of the country's most popular horse racing states, eight other states have committed to a uniform medication and drug testing program: the Mid Atlantic Uniform Medication Program.⁴⁹ The Thoroughbred Horsemen's Association (THA) initiated the agreement.⁵⁰ The participating states include: New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, and Massachusetts.⁵¹ Duncan Patterson, the Chairman of the Delaware Thoroughbred Racing Commission, stated that the agreement demonstrates that the racing industry has the means and wherewithal to join together to protect the integrity of the industry and the welfare of the horses.⁵² This Program seemingly

⁴³ Hegarty, *supra* note 43.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Russolello, *supra* note 28.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Eight States Commit to Uniform Drug Rules*, BLOOD HORSE (Mar. 12, 2013), <http://www.bloodhorse.com/horse-racing/articles/122491/eight-states-commit-to-uniform-drug-rules>.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

underscores the desire by many state commissions to adopt a national scheme for uniform drug regulation. It also, however, underscores the necessity for Congressional action to do so, as many state racing commissions have refused to participate.⁵³

II. THE NATIONAL APPROACH

A. Background

Prior to 1998, there was no coordinated effort to regulate drug usage in any sport.⁵⁴ Rather, each sport had differing definitions, policies, sanctions, and punishments for using drugs.⁵⁵ Then, in 1998, the Tour de France cycling scandal demonstrated the need for such regulation. In relevant part, that scandal led to the creation of an independent international agency designed to create universally accepted medication and drug-testing policies to combat steroid usage in sports—the World Anti-Doping Agency (WADA).⁵⁶

WADA's mission led to the creation of the World Anti-Doping Code, which aims "to advance the anti-doping effort through universal harmonization of core anti-doping elements."⁵⁷ The World Anti-Doping Code was adopted by all international sports and governments in 2003. Under this approach, a country must create an organization to enforce the WADA policy within its borders for its athletes to participate in the Olympics.⁵⁸ In the United States, the USADA enforces the WADA policy.⁵⁹

As the WADA signatory, the USADA collects samples from athletes within the United States who seek to participate in the Olympics.⁶⁰ These samples are collected under procedures that comply with the World Anti-Doping Code and WADA.⁶¹ Upon collecting these samples, the USADA then conducts investigations

⁵³ *Id.*

⁵⁴ Wendt, *supra* note 6, at 178.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Matt Hegarty, *USADA Under the Microscope*, DAILY RACING F. (Aug. 9, 2015), <http://www.drf.com/news/usada-under-microscope> [https://perma.cc/7TGV-LFLT].

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

into potential violations and determines the penalties for any infractions in accordance with WADA guidelines.⁶²

Although the Olympics includes three equestrian sports, horse racing is not one of them. Thus, there is no requirement for the horse racing industry to adopt the WADA approach. An underlying funding issue may also be a contributing factor. From 2012 to 2015, the USADA's annual budget was approximately \$14 million;⁶³ an amount that is less than half of what state racing commissions spent, approximately \$30 million, on drug testing and enforcement in 2014.⁶⁴ Without any indication that the USADA's budget would increase to account for the additional spending, a funding deficiency would exist. This is an additional reason why horse racing has not adopted WADA's approach.

B. Past Efforts

Beyond WADA's approach, there have been efforts to create national standards for drug regulation within the sport. The 1978 Horse Racing Act marked the first instance of legislative oversight of horse racing.⁶⁵ Notably, though this Act provides the Federal Trade Commission with oversight and enforcement powers in horseracing, it fails to provide any meaningful approach to the regulation of drug usage. Several attempts, however, have been made.⁶⁶

During the 1980s, after contemplating banning drugs in horse racing,⁶⁷ Congress ultimately decided to leave that decision to individual states.⁶⁸ As a result, the thirty-eight separate state racing commissions with thirty-eight different drug standards were formed.⁶⁹ Owners and organizations, however, are now calling for Congress to reconsider its stance and intervene.⁷⁰ Arthur B. Hancock III, whose grandfather founded Claiborne Farm, the storied former home of Secretariat and Seabiscuit, stated, "I'm really hoping that we can get Congress's help because

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Wendt, *supra* note 6, at 177.

⁶⁶ *Id.* at 184-185.

⁶⁷ Wendt, *supra* note 6, at 179.

⁶⁸ *Id.*

⁶⁹ Wendt, *supra* note 6, at 177.

⁷⁰ *Id.* at 179.

drugs have really hurt our sport One trainer uses drugs . . . and another feels like he has to do it We owe it to these noble, beautiful animals to do something.”⁷¹

Chairman of The Jockey Club, Ogden Mills Phipps, has been working with the state racing commissions to unify anti-drug efforts.⁷² Phipps has argued that if the major racing states continue to refuse the implementation of drug reform, the Jockey Club will seek rapid implementation of the Horseracing Integrity and Safety Act of 2015.⁷³ This bill would designate the United States Anti-Doping Agency (USADA) “as the independent anti-doping organization with responsibility for ensuring the integrity and safety of those horse races that are the subject of interstate off-track wagers.”⁷⁴ Representative Pitts, who introduced the bill, said, “It’s an industry that has, for years, pledged to clean things up. . . . But things seem to be getting worse, not better.”⁷⁵

III. THE THOROUGHBRED HORSERACING ACT OF 2015

A. Background and Purpose of the Act

The most recent uniform approach, the Thoroughbred Horseracing Act of 2015, has been proposed by Representatives Andy Barr of Kentucky and Paul Tonko of New York.⁷⁶ Much like the Horseracing Integrity and Safety Act of 2015, the THA would task the USADA with standardizing medication rules that currently vary by state.⁷⁷ Congress, however, made extensive findings regarding the annual economic impact of horse racing on the United States’ economy.⁷⁸ Most importantly, recall that Congress determined that the industry accounts for nearly \$25,000,000,000 to the United States economy and that many horses competed in more than one state.⁷⁹ Aside from these

⁷¹ Juliet Macur, *Horse Racing Still Stumbling in Antidrug Push*, N.Y. TIMES (Jun. 3, 2014), <https://www.nytimes.com/2014/06/04/sports/horse-racing-still-stumbling-in-push-against-drugs.html> [https://perma.cc/X6SQ-KJ6S].

⁷² Wendt, *supra* note 6, at 179.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Zalesin, *supra* note 10.

⁷⁷ *Id.*

⁷⁸ H.R. 3084, *supra* note 25.

⁷⁹ *Id.*

congressional findings, the legislation is similar to the previously proposed Horseracing Integrity and Safety Act of 2015.

B. Distinct Legislation or By-the-Wayside Effort?

This legislation and the Horseracing Integrity and Safety Act of 2015 both task the USADA with the oversight powers to produce a standardized set of national medication rules.⁸⁰ Accordingly, this legislation seems to be an extension of the WADA approach, which also tasks the USADA with similar oversight powers.

Such reliance, however, on the USADA will likely present the same potential issues as those mentioned with the adoption of the WADA approach. Specifically, recall that there has been no indication that any increase in government funding would be provided to the USADA to account for the additional expenses of administering a national drug policy in the racing industry. This lack of funding is one of the many reasons that stakeholders refuse to seek a uniform drug policy.⁸¹ But, according to congressional findings, the THA is distinguished by its financial impact on the industry.⁸²

C. Why the Legislation Will Likely Fail

The THA of 2015 will likely meet the same opposition as past efforts to institute a national approach. Most opponents of the proposed legislation point to the broad powers vested in the USADA.⁸³ Most importantly, opponents assert that the USADA lacks the required competency to oversee drug regulation in horse racing.⁸⁴ Specifically, Ed Martin, the President of the ARCI, expressed concerns that the USADA lacks veterinarian involvement.⁸⁵ This issue, however, should not cause the legislation to fail; it could seemingly be resolved by authorizing

⁸⁰ H.R. 3084 *supra* note 25; *see also* H.R. 2641, *supra* note 12.

⁸¹ ARCI, NHBPA *Express Opposition to Proposed Horseracing Integrity Act*, *supra* note 21.

⁸² H.R. 3084 *supra* note 25.

⁸³ Zalesin, *supra* note 11.

⁸⁴ *Id.*

⁸⁵ ARCI, NHBPA *Express Opposition to Proposed Horseracing Integrity Act*, *supra* note 21.

another organization with veterinarian involvement to oversee drug regulation in horse racing. In fact, though no such efforts have been made, the proposed resolution would require nothing more than a few strokes of a pen. Solutions, however, to the other problems opponents provide for rejecting this and past reform efforts are not so simple.

IV. OPPONENTS OF THE NATIONAL APPROACH

A. Background and General Arguments

There are two primary not-so-simple arguments as to why opponents believe a national approach is unneeded: (1) it would unconstitutionally usurp states' rights; and (2) the sport of horse racing is clean and such regulations are therefore not needed.⁸⁶ Neither argument is persuasive.

B. States' Rights Issue

Opponents argue that the implementation of the national approach would violate states' rights and add an unneeded layer of bureaucracy.⁸⁷

i. Constitutional analysis

When confronted with states' rights issues, the Supreme Court asks two threshold questions: (1) whether Congress has the authority to act under the Constitution; and (2) if so, does the congressional act infringe on state sovereignty under the 10th Amendment?⁸⁸ In *McCulloch v. Maryland*, the Court held that the United States had an implied power to create the Bank of the United States under its Necessary and Proper Clause powers.⁸⁹ Furthermore, the Court also determined that states lack the power, by taxation or otherwise, to impede or control any of the constitutional means employed by the United States to execute its powers under the Constitution.⁹⁰

⁸⁶ Barker, *supra* note 14; see also Paulick, *supra* note 21.

⁸⁷ Barker, *supra* note 14.

⁸⁸ *McCulloch v. Maryland*, 17 U.S. 316, 319-21 (1819).

⁸⁹ *Id.* at 316.

⁹⁰ *Id.*

ii. Hypothetical analysis

Although *McCulloch* is factually distinct, its logic regarding congressional authority to create a national bank demonstrates that adopting a national approach to drug regulation in thoroughbred racing would not violate states' rights. Recall the first inquiry under *McCulloch*: does Congress have the authority to act under the Constitution?⁹¹ Here, Congress will likely not violate states' rights by passing the THA of 2015.

Under the THA of 2015, Congress made findings to demonstrate that the horse racing industry significantly impacts the United States' economy.⁹² Because this economic influence is provided in support of the proposed legislation, Congress has implied action under their Commerce Clause powers.

C. Commerce Clause Power

Congressional power under the Commerce Clause has shifted throughout the history of the United States.⁹³ The Commerce Clause provides Congress with "the power to . . . regulate commerce . . . among the several states."⁹⁴ When determining whether Congress has the authority to act under the Commerce Clause, the Court has consistently held that Congress may regulate the: (1) channels of interstate commerce; (2) instrumentalities of interstate commerce, or persons or things, although the threat posed may come only from intrastate activities; and (3) activities that substantially affect interstate commerce.⁹⁵

When analyzing Congress' ability to act under the Commerce Clause, the Court typically looks at three factors announced in *United States v. Lopez*: (1) the economic activity being regulated; (2) the jurisdictional language that limits such

⁹¹ *Id.* at 319.

⁹² H.R. 3084, *supra* note 25.

⁹³ David Forte, *Commerce, Commerce, Everywhere: The Uses and Abuses of the Commerce Clause*, THE HERITAGE FOUNDATION (Jan. 18, 2011), <http://www.heritage.org/research/reports/2011/01/commerce-commerce-everywhere-the-uses-and-abuses-of-the-commerce-clause>.

⁹⁴ U.S. CONST. art. I, § 8, cl. 3.

⁹⁵ *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

regulation; and (3) legislative findings that tend to show an effect on interstate commerce.⁹⁶ The *Lopez* factors, though not dispositive in every case, generally indicate the constitutionality of congressional action under the Commerce Clause.

For example, in *United States v. Lopez*, the Court determined that Congress did not have the authority to pass the Gun Free School Zones Act under its Commerce Clause power because the Act effectively allowed Congress to regulate purely local activity, thus infringing upon the states' police powers.⁹⁷ Similarly, in *United States v. Morrison*, the Violence Against Women Act was declared unconstitutional under Congress' Commerce Clause powers because Congress not only failed to show any link between the legislation and economic activity, but also failed to provide limiting jurisdictional language.⁹⁸

Alternatively, the THA should constitute a constitutional exercise of Congress' Commerce Clause powers; Congress should be able to establish the necessary link between the THA and economic activity. When proposing the THA, congressional findings demonstrated that the racing industry contributes significantly to the United States economy annually—approximately \$25,000,000,000.⁹⁹ This, in addition to the same horses often competing in different states, clearly implicates Congress' Commerce Clause power as Congress is seeking to regulate an activity that substantially affects interstate commerce.¹⁰⁰

The *Lopez* factors further demonstrate Congress' ability to act under the Commerce Clause. Specifically, recall that the legislative findings show that the horse racing industry has an expansive effect on interstate commerce.¹⁰¹ Beyond these legislative findings, the text of the THA provides for the establishment of "the Thoroughbred Horseracing Anti-Doping Authority as an independent organization with responsibility for developing and administering an anti-doping program for thoroughbred horses . . . and horseraces . . . that are the subject of interstate off-track wagers."¹⁰²

⁹⁶ *Id.* at 560-63.

⁹⁷ *Id.* at 567-68.

⁹⁸ *United States v. Morrison*, 529 U.S. 598 (2000).

⁹⁹ H.R. 3084, *supra* note 25.

¹⁰⁰ *Lopez* at 560-63.

¹⁰¹ H.R. 3084, *supra* note 25.

¹⁰² *Id.*

The specific language of this legislation is important because it limits the scope of the proposed legislation to “horseraces . . . that are the subject of interstate off-track wagers.”¹⁰³ This language reflects that Congress has pinpointed the precise economic activity being regulated, the jurisdictional scope of that regulation, and the impact of the horse racing industry on the national economy. Accordingly, this legislation complies with the *Lopez* factors.¹⁰⁴

D. Tenth Amendment Implications

Though the THA would be a constitutional exercise of congressional authority under the Commerce Clause, *McCulloch* further instructs that the law may need to be examined for Tenth Amendment violations.¹⁰⁵ That is, it must be determined whether the THA infringes state sovereignty. The Tenth Amendment provides that, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”¹⁰⁶ Although the Constitution does not specifically provide that Congress may regulate the horse racing industry, it does provide that Congress may regulate commerce.¹⁰⁷

Here, unlike *Lopez*, Congress would not be violating the states’ police powers by passing a uniform approach to combat steroid usage in horse racing.¹⁰⁸ The states are implicitly granted the power to establish and enforce laws protecting the welfare, safety, and health of the public.¹⁰⁹ But these police powers do not include the regulation of steroid usage in thoroughbred racing. Therefore, Congress could likely pass the THA under the authority of the Commerce Clause and would not infringe upon states’ rights.

¹⁰³ *Id.*

¹⁰⁴ *Lopez* at 560-63.

¹⁰⁵ *See* *United States v. Lopez*, 514 U.S. 549 (1995); *see also* *United States v. Morrison*, 529 U.S. 598 (2000).

¹⁰⁶ U.S. CONST. amend. X.

¹⁰⁷ U.S. CONST. art. I, § 8, cl. 3.

¹⁰⁸ *Lopez* at 567-68.

¹⁰⁹ Nolo’s Plain-English Law Dictionary, *Police Powers*, NOLO, <http://www.nolo.com/dictionary/police-powers-term.html> (last visited Aug. 19, 2017) [<https://perma.cc/27XF-L7Z5>].

E. Outlook

Although the THA could pass constitutional muster, the legislation is still likely to fail due to the lobbying efforts of the state regimes. In addition to the reasons that this legislation will likely fail, the proposed legislation could arguably be in violation of the Tenth Amendment for reasons that will be elucidated in Section VI.

V. AMENDING THE 1978 HORSE RACING ACT

In 1978, Congress exercised federal control over the horse racing industry when it passed the Interstate Horse Racing Act of 1978.¹¹⁰ The 1978 Horse Racing Act provides that "the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders."¹¹¹ Congress did, however, provide that the purpose of the 1978 Horse Racing Act was to regulate interstate commerce with respect to wagering on horse racing.¹¹² Although this legislation is limited to wagering on horse racing, the result was the institution of the thirty-eight racing commissions that maintain individual regulatory authority.¹¹³

A. Implications of the 1978 Horse Racing Act

Due to a lack of federal regulation regarding steroid usage in thoroughbred racing, states have taken it upon themselves to do so as evidenced by the thirty-eight state racing commissions.¹¹⁴ Accordingly, opponents of federal regulation could likely argue that federal regulation at this point would usurp states' rights because Congress implicitly authorized states to regulate steroid usage in horse racing by failing to act; thus, reserving this right to the states pursuant to the Tenth Amendment.

¹¹⁰ Cassidy, *supra* note 34, at 127.

¹¹¹ Interstate Horseracing Act of 1978, 15 U.S.C. § 3001 (1978).

¹¹² *Id.*

¹¹³ Cassidy, *supra* note 34, at 127.

¹¹⁴ *Id.*

Assuming that such a failure to act would reserve this right to the states, the question then becomes whether Congress could eventually act to take back such powers. Fortunately, the dormant Commerce Clause is likely implicated in this situation, thus enabling Congress to act to amend the Interstate Horse Racing Act of 1978 to include regulation of steroid usage in horse racing.

B. Dormant Commerce Clause Power

In relevant part, the Commerce Clause provides Congress with the power to regulate commerce among the several states.¹¹⁵ As an expansion of this power, the Supreme Court has implicitly created a prohibition on states from creating legislation that discriminates against interstate commerce.¹¹⁶ This prohibition prevents a state from prohibiting, restricting, or discriminating against products from other states.¹¹⁷ As an illustration, Michigan, for example, could not enact legislation prohibiting the importation of buckeyes from Ohio.¹¹⁸ Despite this prohibition, the current state-by-state patchwork of drug regulations seemingly do just that: due to conflicting drug laws, it disallows certain out-of-state horses from racing in Kentucky that have ingested steroids, or other drugs, that Kentucky prohibits.

The prohibition provided by the dormant Commerce Clause rests upon arguments that the Constitution vests Congress with exclusive dominion over the regulation of commerce.¹¹⁹ The dormant Commerce Clause is driven by concern about “economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.”¹²⁰

State regulatory measures that *expressly* mandate such differential treatment, and consequently run afoul of the dormant Commerce Clause, have typically been struck down by most courts.¹²¹ These laws are considered facially discriminatory, and courts subject them to strict scrutiny review. Strict scrutiny not

¹¹⁵ U.S. CONST. art. I, § 8, cl. 3.

¹¹⁶ Timothy J. Slattery, *The Dormant Commerce Clause: Adopting a New Standard and a Return to Principle*, 17 WM. & MARY BILL RTS. J. 1243, 1250-51 (2009).

¹¹⁷ *Id.* at 1251.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988).

¹²¹ *Granholt v. Heald*, 544 U.S. 460, 472 (2005).

only requires a state to demonstrate that the law has a non-protectionist purpose but also that there is no less discriminatory means for achieving that purpose.¹²²

As an example of this, the dormant Commerce Clause was triggered when a state's regulatory scheme permitted in-state wineries to directly ship alcohol to consumers, but restricted the ability of out-of-state wineries to do so. In response, the Court reaffirmed its prior holdings in stating that "states may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state business."¹²³ These concerns are equally apparent in horse racing. States that have adopted less stringent drug regulations in horse racing to attract more horses and increase state revenues, would likely violate the dormant Commerce Clause because such regulations would give a "competitive advantage" to those states with less stringent drug regulations.¹²⁴

Under dormant Commerce Clause jurisprudence, courts will also apply strict scrutiny if a law controls commerce that occurs wholly outside of the state.¹²⁵ Specifically, courts look at whether the statute controlling conduct in another state potentially gives rise to inconsistent legislation being applied to the same activity.¹²⁶ In another example, the Supreme Court has held that a law requiring out-of-state beer shippers to affirm that their posted prices were no higher than the prices in bordering states was unconstitutional under the dormant Commerce Clause. The Court reasoned that the statute effectively enabled one state to control commercial activity occurring wholly outside the boundary of that state.¹²⁷ In horse racing, enabling one state to permit certain drugs that another state does not, like the use of stanozolol in New York and Kentucky, effectively enables the stricter state to control the commercial activity of the more lenient state by preventing horses from competing in both states.¹²⁸

¹²² State Power Project, *Dormant Commerce Clause*, WORDPRESS, https://statepowerproject.org/dormant-commerce-clause/#_ftn2 (last visited Sept. 1, 2017) [<https://perma.cc/JHM6-XNYV>].

¹²³ Granholm at 472.

¹²⁴ Cassidy, *supra* note 34, at 129.

¹²⁵ Healy v. Beer Inst., 491 U.S. 324, 336-37 (1989).

¹²⁶ *Id.*

¹²⁷ *Id.* at 338, 339.

¹²⁸ Russolello, *supra* note 28 [<https://perma.cc/TM37-PB8K>].

Opponents could argue that the state regulations in the horse racing industry are not subject to the dormant Commerce Clause under the market participant exception.¹²⁹ This exception to the Commerce Clause's scrutiny is triggered when the state functions as a market participant rather than a market a regulator.¹³⁰ The Supreme Court upheld a Maryland program that paid haulers to remove abandoned cars from streets, making it more difficult for out-of-state haulers to participate under this market participant exception.¹³¹ Likewise, the Court also upheld a South Dakota policy that restricted out-of-state sales by a state-owned cement factory during times of shortage.¹³²

However, the thirty-eight states that have adopted independent drug regulations for thoroughbred racing are not acting as market participants in the horse racing industry; rather, each state is operating as a regulator for a national horse racing industry. Specifically, each of the separate racing commissions is effectively using their coercive powers to establish different or more lenient drug policies to dictate the ways in which other states interact in the racing industry. Because the aforementioned state drug regulations likely violate the dormant Commerce Clause, Congress must act to provide a uniform approach to combat steroid usage in thoroughbred racing because of the impact horse racing has on the national economy.

C. Congressional Power to Regulate

Based upon the economic impact of the racing industry on the United States, Congress' Commerce Clause powers, and the implications of the 1978 Horse Racing Act, Congress has the power and, likely, the duty to establish a national approach to drug regulation in thoroughbred racing. Recall that the 1978 Horse Racing Act provides Congress with the ability to regulate interstate off-track wagers of horse racing.¹³³ Furthermore, Congress has made extensive findings regarding the economic

¹²⁹ State Power Project, *supra* note 133 [<https://perma.cc/JHM6-XNYV>].

¹³⁰ Legal Information Institute, *Market Participant Exception*, CORNELL UNIVERSITY LAW SCHOOL, https://www.law.cornell.edu/wex/market_participant_exception [<https://perma.cc/29N2-65BB>].

¹³¹ *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 813-14 (1976).

¹³² *Reeves, Inc. v. Stake, et al.*, 447 U.S. 429, 445 (1980).

¹³³ Interstate Horseracing Act of 1978, 15 U.S.C. § 3001.

impact of horse racing on the national economy; importantly, interstate off-track wagers are one of the leading contributions to this economic impact.¹³⁴

However, this lack of a national drug regime in thoroughbred racing is striking at the core of the 1978 Horse Racing Act. Specifically, the 1978 Horse Racing Act provides that the federal government should ensure state cooperation for interstate wagering purposes.¹³⁵ However, the differences amongst the states' drug policies are negatively impacting such wagers by enabling horses to compete in some states but not others for drug violations; a uniform approach would undoubtedly resolve this issue. By instituting an amendment to the 1978 Horse Racing Act, Congress could resolve this issue succinctly. Such an amendment could require that each state must comport with a national drug policy of prescribed drugs or could provide for a governing body, like the USDA, to oversee the standardization of drug policies in the industry.

CONCLUSION

Thoroughbred horse racing, like any other sport, is premised on the idea that each competing horse should be equal.¹³⁶ And, of course, some horses are more gifted than others. Steroid abuse in horse racing, however, has created an arena that enables humans to control another aspect of life by building the most elite horse. Aside from this human element that has become commonplace in the industry, the current state-by-state framework encourages such behaviors by allowing less stringent drug policies to attract the best horses.

Congress must act to discourage this behavior. Although horses will continue to need the use of some drugs to combat disease and other illness, a uniform approach must be adopted to prevent this sport from becoming just another aspect of human dominion. Without congressional regulation, the sport of horse racing will likely continue to become more fragmented, resulting in a once illustrious sport becoming an object of nostalgia.

¹³⁴ H.R. 3084, *supra* note 25.

¹³⁵ Interstate Horseracing Act of 1978, 15 U.S.C. § 3001.

¹³⁶ Friedman, *supra* note 1, at 152 [<https://perma.cc/34SH-DT9J>].